

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's Rules Regarding)	WT Docket No. 04-344
Maritime Automatic Identification Systems)	

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2011

Released: May 26, 2011

By the Commission: Commissioner Baker not participating.

I. INTRODUCTION

1. This *Memorandum Opinion and Order* denies a petition for reconsideration of the *Second Report and Order* in this proceeding. In the *Second Report and Order*, the Commission designated maritime VHF Channel 87B (161.975 MHz) for exclusive use by maritime Automatic Identification Systems (AIS) in the thirty-three inland VHF Public Coast (VPC) service areas (VPCSA), and provided a framework and timetable for clearing Channel 87B of non-AIS operations in the inland VPCSA.¹ PacifiCorp, an inland VPCSA geographic licensee, filed a petition for reconsideration of the period in which inland VPCSA incumbents must vacate Channel 87B.² We decline to extend this period generally to non-AIS operations because such an extension would undermine the primary goal of this proceeding – the rapid, interference-free implementation of the AIS network. PacificCorp also requests that the Commission rechannelize the VPC frequency band in order to facilitate more efficient spectrum usage, but the proposals to modify the VPC plan are beyond the scope of this rulemaking proceeding.

II. BACKGROUND

2. AIS, which is used to monitor and track maritime traffic for purposes of both navigational safety and homeland security, is a global maritime navigation safety communications system through which marine vessels automatically transmit navigational data to appropriately equipped shore stations, other ships, and aircraft.³ The International Telecommunication Union has designated VHF maritime

¹ See Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Second Report and Order*, WT Docket No. 04-344, 23 FCC Rcd 13711, 13716-22 ¶¶ 8-16 (2008), *erratum*, 24 FCC Rcd 3241 (2009) (*Second Report and Order*). The Commission established nine licensing regions near major waterways, *i.e.*, the maritime VPCSA, and thirty-three inland VPCSA, when it adopted geographic licensing for VPC stations in 1998. See Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd 19853, 19861-63 ¶¶ 14-16 (1998). For a list of the maritime and inland VPCSA, see 47 C.F.R. § 80.371(c)(1)(ii).

² PacifiCorp Petition for Reconsideration (filed Mar. 2, 2009) (Petition). The Petition was placed on public notice on March 26, 2009. See Petition for Reconsideration of Action in Rulemaking Proceeding, *Public Notice*, Report No. 2884 (rel. Mar. 26, 2009). MariTEL, Inc., filed comments in support, Reply to Petition for Reconsideration (filed Apr. 17, 2009) (MariTEL Comments), and Motorola, Inc., filed an opposition, Opposition to Petition for Reconsideration (filed Apr. 20, 2009) (Opposition). PacifiCorp filed a reply. Reply to Opposition to Petition for Reconsideration (filed Apr. 30, 2009) (Reply).

³ See 47 C.F.R. § 80.5. For more information regarding AIS, see *Second Report and Order*, 23 FCC Rcd at 13712-13 ¶¶ 2-3.

Channel 87B for AIS use in international waters.⁴

3. In the *Report and Order* in this proceeding, the Commission designated Channel 87B for exclusive AIS use only in the nine maritime VPCSA.⁵ Because the majority of the commenters favored designating Channel 87B for exclusive AIS use nationwide,⁶ the Commission invited comment in the *Further Notice of Proposed Rule Making (Further Notice)* on whether to extend the AIS designation to the thirty-three inland VPCSA.⁷ In the *Second Report and Order*, the Commission concluded that it would serve the public interest to designate Channel 87B for exclusive AIS use on a nationwide basis.⁸ The Commission required inland VPCSA licensees to vacate Channel 87B within two years⁹ after the effective date of the redesignation of Channel 87B.¹⁰

4. Two duplex VPC channels had been set aside for public safety interoperability in each inland VPCSA. Specifically, Channel 25 (157.250/161.850 MHz) was set aside in each inland VPCSA, and either Channel 84 (157.225/161.825 MHz) or Channel 85 (157.275/161.875 MHz) was also set aside in each inland VPCSA.¹¹ The Commission determined in the *Second Report and Order* that it was

⁴ See WRC-97 Final Acts (amending ITU *Radio Regulations* App. S18). Channel 88B (162.025 MHz) also is designated for AIS use in international waters, but is not at issue herein.

⁵ See Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 04-344 & PR Docket No. 92-257, 21 FCC Rcd 8892, 8904 ¶ 18, 8907-08 ¶¶ 23-24 (2006) (*Report and Order* and *Further Notice*, respectively). The Commission had tentatively concluded in the *Notice of Proposed Rule Making* in this proceeding that there appeared to be little need for AIS in inland VPCSA. See Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No. 04-344, 19 FCC Rcd 20071, 20106 ¶ 63 (2004).

⁶ See *Report and Order*, 21 FCC Rcd at 8928-30 ¶¶ 50-51.

⁷ See *Further Notice*, 21 FCC Rcd at 8933-34 ¶¶ 58-59.

⁸ See *Second Report and Order*, 24 FCC Rcd at 13716 ¶ 8. Expanding the AIS designation of Channel 87B to the inland VPCSA, the Commission reasoned, would enhance the safety of navigation on inland waterways; allow a seamless nationwide and global AIS network; avoid the potential interruption of vessel tracking that could occur if vessels had to switch to a different AIS channel when transiting an AIS "fence" between U.S. coastal and inland waterways; and avoid interference to AIS communications from co-channel non-AIS communications. *Id.* at 13716-13718 ¶¶ 9-12. In addition, the Commission determined that clearing Channel 87B of non-AIS operations in the inland as well as the maritime VPCSA "would be necessary to maximize the effectiveness of satellite AIS operations." *Id.* 13721-22 ¶ 16.

⁹ The two-year deadline was March 2, 2011. See 74 Fed. Reg. 5117 (Jan. 29, 2009). On February 25, 2011, the Wireless Telecommunications Bureau granted a temporary waiver of the deadline to affected inland VPCSA licensees. See Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Order*, 26 FCC Rcd 2120 (WTB 2011).

¹⁰ See *Second Report and Order*, 24 FCC Rcd at 13725 ¶ 21. The Commission stated, "This transition period should be ample to avoid any disruption of existing operations by inland VPCSA licensees, and should not otherwise prove onerous to the licensees. At the same time, this limited relief for existing inland VPCSA licensees should not compromise efforts to implement AIS in the United States as quickly and broadly as possible." *Id.* In contrast, the Commission provided fifteen-year grandfathering protection to the two site-based incumbent PLMR licensees operating on Channel 87B, concluding that their continued operation on Channel 87B posed little risk of harmful interference to AIS. *Id.* at 13722-23 ¶ 17.

¹¹ See 47 C.F.R. §§ 80.371(c)(1)(ii), 90.20(g)(2) (2006).

appropriate to redesignate Channels 84 and 85 for use by inland VPC licensees.¹² PacifiCorp, among other commenters, specifically requested this additional VPC spectrum.¹³

5. The Commission grandfathered the public safety incumbents on Channels 84 and 85 for fifteen years following the effective date of the redesignation of Channel 87B.¹⁴ The Commission recognized that, with the inland VPCSA licensees having to vacate Channel 87B within two years while the public safety incumbents could remain on Channels 84 and 85 for fifteen years, there would be a period during which some inland VPCSA incumbents would have to protect incumbent public safety operations on Channel 84 or 85.¹⁵

III. DISCUSSION

A. Grandfathering Period for Inland VPCSA Licensees

6. PacifiCorp argues that allowing public safety incumbents to remain on Channels 84 and 85 for up to fifteen years while mandating that inland VPCSA licensees migrate to those channels within two years “significantly undermine[s] the ability of certain geographic area licensees on VPC Channel 87, such as PacifiCorp, to make a seamless transition to replacement Channels 84 and 85.”¹⁶ It requests that the Commission extend the grandfathering period for inland VPCSA licensees to remain on Channel 87B to six months after the public safety incumbent(s) in that VPCSA vacate Channel 84 or 85.¹⁷ In the alternative, PacifiCorp requests that affected inland VPCSA licensees be given “the right to apply for an unlicensed exclusive-use channel in the VHF band,” such as a Part 22 VHF channel, to use until six months after Channel 84 or 85 is vacated.¹⁸ We are not persuaded that we should extend the grandfathering period for inland VPCSA licensees to remain on Channel 87B.

7. The paramount goal of this proceeding is to “ensure that AIS is deployed widely, quickly, reliably, and cost-effectively, and in a manner that will maximize its capabilities.”¹⁹ In the *Second Report and Order*, moreover, the Commission concluded that there are “compelling safety and national security reasons to designate Channel 87B for AIS on a nationwide basis.”²⁰ Permitting the continued use of

¹² See *Second Report and Order*, 24 FCC Rcd at 13724 ¶¶ 19-20. The Commission noted that public safety entities had made relatively little use of the set-aside channels, and that only four entities were licensed to use them at that time. See *id.* at 13723-24 ¶ 18 & n.84. The Commission also noted that significant additional spectrum had been designated for public safety interoperability in the years since Channels 84 and 85 had been so designated. *Id.* at 13723-24 ¶ 18 & n.85.

¹³ See *id.* at 13724 ¶¶ 19-20 & nn. 89-90, *citing, e.g.*, PacifiCorp Reply Comments at 1, 4-5, 7-8.

¹⁴ See *id.* at 13724 ¶ 20 & n.92. The Commission concluded that allowing the public safety incumbents to continue operating on those channels for fifteen years would provide them with sufficient time to transition to other channels without disruption, and allow them to use their existing equipment until the end of its useful life. *Id.* at 13724 ¶ 20.

¹⁵ *Id.* at 13725 n.97.

¹⁶ See Petition at 4-5.

¹⁷ *Id.* at 1, 7-8. It is not clear whether PacifiCorp proposes that we extend the period during which an inland VPCSA licensee may operate on Channel 87B only in the specific locations where incumbent public safety licensees continue to operate on Channel 84 or 85, or throughout the inland VPCSA licensee’s entire license area.

¹⁸ See *id.* at 8. PacifiCorp does not seek any reduction in the grandfathering protection accorded to the public safety incumbents. See Reply at 1-2, 4-5.

¹⁹ See *Report and Order*, 21 FCC Rcd at 8907 ¶ 23; *Second Report and Order*, 24 FCC Rcd at 13711-12 ¶ 1.

²⁰ See *Second Report and Order*, 24 FCC Rcd at 13721 ¶ 16.

Channel 87B for non-AIS communications, the Commission stated, “would compromise the integrity of the domestic, and by extension the global, AIS network.”²¹ We continue to believe that permitting inland VPCSA incumbents to remain on Channel 87B for an extended period would impede the rapid, interference-free implementation of the domestic AIS network, and thus undermine the primary goal of this proceeding.

8. In crafting the rules adopted in the *Second Report and Order*, in particular those relating to the grandfathering of incumbent users of Channels 84, 85 and 87, the Commission had to balance three competing public interest aims: ensuring the expeditious and effective deployment of AIS in the United States, minimizing any adverse effects on inland VPCSA incumbents stemming from the loss of Channel 87B, and minimizing any adverse effects on public safety incumbents from the redesignation of Channels 84 and 85. The difficulties described by PacifiCorp were not unanticipated, for the Commission recognized that some inland VPCSA licensees would be migrating to spectrum that might remain encumbered by public safety incumbents for some time.²² Rather, the Commission determined that delay in affording some inland VPCSA licensees unencumbered use of Channels 84 and 85 was necessary in light of the overall public interest. The Commission explicitly distinguished inland VPCSA licensees from public safety incumbents, and explained why commensurate grandfathering periods would not be appropriate.²³ We continue to believe that the balance struck in the *Second Report and Order* is the correct one.

9. PacifiCorp asserts that it is unprecedented and unreasonable to require a licensee to migrate to spectrum that may not be fully available to it for such a long period.²⁴ We find inapposite the precedent cited by PacifiCorp, however, for in those proceedings, the Commission required the affected incumbent licensees to relinquish much or all of their existing spectrum²⁵ – a factor that readily distinguishes those proceedings from the instant one, where all but one of the channels assigned to VPCSA licensees remain available.

10. Finally, we do not believe that the record substantiates the claim that inland VPCSA licensees in general are unduly burdened by the requirement to migrate to Channel 84 or 85 within two years while protecting any co-channel public safety incumbents for up to fifteen years. In most of the part of the country that is divided into inland VPCSAs, there are no public safety incumbents on Channel 84 or 85.²⁶ No other inland VPCSA incumbent has sought reconsideration of the grandfathering provisions

²¹ *Id.* at 13721 ¶ 16. PacifiCorp does not challenge any of these conclusions.

²² *Id.* at 13725 n.97.

²³ *Id.* at 13724-25 ¶¶ 20-21.

²⁴ See Petition at 5-7, citing Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) (*Emerging Technologies First R&O*); Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, PR Docket No. 93-144 & GN Docket No. 93-252, 11 FCC Rcd 1463 (1995) (*800 MHz SMR First R&O*).

²⁵ In the *Emerging Technologies* proceeding, the Commission reallocated 220 megahertz of spectrum – the 1850-1990, 2110-2150, and 2160-2200 MHz bands – from incumbent licensees in the 2 GHz fixed microwave service. See *Emerging Technologies First R&O*, 7 FCC Rcd at 6889-90 ¶ 21. In the *800 MHz SMR* proceeding, incumbent site-based Specialized Mobile Radio licensees were displaced by the designation of two hundred paired channels at 816–821/861–866 MHz for geographic licensing. See *800 MHz SMR First R&O*, 11 FCC Rcd at 1467 ¶ 1 & n.1.

²⁶ See note 12, *supra*.

adopted in the *Second Report and Order*,²⁷ and even PacifiCorp confines its discussion to the situation in Wyoming.²⁸ The Commission's rules permit PacifiCorp to request a waiver, and argue why its circumstances satisfy the applicable waiver standard.²⁹ In sum, we find that PacifiCorp has not demonstrated a need to revisit the grandfathering provisions adopted in the *Second Report and Order*.

B. Rechannelization of VPC Spectrum

11. PacifiCorp also asserts that, even where Channels 84 and 85 are not encumbered by public safety incumbents, the designation of those channels as VPC spectrum does not fully offset inland VPCSA licensees' loss of Channel 87B. VPC channels are 25 kilohertz wide, but, under Section 80.371(c)(1)(iii) of the Rules, VPC licensees "may also operate on 12.5 kHz offset frequencies in areas where the licensee is authorized on both frequencies adjacent to the offset frequency, and in areas where the licensee on the other side of the offset frequency consents to the licensee's use of the adjacent offset frequency."³⁰ Thus, an inland VPCSA incumbent licensed on Channels 27 (157.350/161.950 MHz), 87 (157.375/161.975 MHz), and 28 (157.400/162.000 MHz) can operate on the interstitial channel between Channels 27 and 87 and the interstitial channel between Channels 87 and 28.³¹ After the licensee replaces Channel 87B with Channel 84 or 85, however, it loses those two interstitial channels and gains only one interstitial channel (*i.e.*, either the interstitial channel between Channels 24 and 84 or the interstitial channel between Channels 85 and 26), because Channels 84 and 85 both are adjacent to Channel 25, which remains designated for public safety interoperability.³² Consequently, PacifiCorp argues, requiring an inland VPCSA incumbent to relocate from Channel 87B to Channel 84 or 85 will result in a net loss to the incumbent of at least one 12.5 kHz interstitial channel.³³

12. To address both this particular issue and what PacifiCorp views more broadly as the current inefficient use of the VPC spectrum, PacifiCorp recommends that the Commission revise the channel plan for the inland VPCSA.³⁴ Specifically, PacifiCorp proposes that the Commission split the

²⁷ MariTEL, while concurring in PacifiCorp's analysis of the net spectrum loss engendered by relocation from Channel 87B to Channel 84 or 85, *see infra*, did not directly address the grandfathering rules or indicate any particular problems that it anticipated in the inland VPCSA for which it is licensed. *See* MariTEL Comments at 1.

²⁸ *See* Petition at 5.

²⁹ *See* 47 C.F.R. § 1.925(b)(3)(ii) (providing that the Commission may grant a waiver if, "[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative").

³⁰ *See* 47 C.F.R. § 80.371(c)(1)(iii).

³¹ *See* Petition at 8-9.

³² PacifiCorp says that accessing the interstitial channels offset from Channel 25, while theoretically possible under Section 80.371(c)(1)(iii) if the relocated inland VPCSA incumbent secures the consent of the Channel 25 licensee(s) in the VPCSA, "is not possible as a practical matter" because the public safety incumbents on Channel 25 are licensed on a site-by-site basis, and no single licensee controls Channel 25 throughout any inland VPCSA. *Id.* at 9.

³³ *Id.* at 8-10. The gravamen of PacifiCorp's complaint is that "the reassignment of Channel 84 or 85 to replace Channel 87 will not make VPC licensees *entirely whole*." *See id.* at 8 (emphasis added). The Commission stated in the *Second Report and Order* that it believed that providing the displaced licensees with access to former public safety set-aside channels was "equitable because it would restore the operating capacity of these licensees," *see Second Report and Order*, 23 FCC Rcd at 13724 ¶ 20, but did not state that this would make the licensees "entirely whole." It observed only that another commenter had argued that the Commission should make the licensees "whole" (and had suggested that giving them access to a set-aside channel would do so). *Id.* at 13724 ¶ 19 & n.89.

³⁴ *See* Petition at 10-13.

25 kHz VPC channels into adjacent 12.5 kHz channels, and permit inland VPC licensees to use two 12.5 kHz channels with channel centers offset 6.25 kHz from the center frequency of each existing 25 kHz channel.³⁵ In the alternative, PacifiCorp suggests that the Commission retain the existing VPC band plan, but shift the twenty-five kilohertz of spectrum that is designated for public safety interoperability in order to make an additional interstitial channel available for VPC use.³⁶ Such action, PacifiCorp says, “will allow for more intensive use of VPC spectrum by avoiding the ‘stranding’ of spectrum where a licensee chooses to deploy more spectrally-efficient 12.5 kHz equipment but does not control both of the adjacent 25 kHz channels.”³⁷

13. We conclude that PacifiCorp’s proposals to modify the VPC channel plan are beyond the scope of this rulemaking proceeding; the *Further Notice* did not seek comment on them, and they are not a logical outgrowth of any proposals that the *Further Notice* did make. In the *Further Notice*, the Commission did not invite comment on modifying either the VPC channel plan or the public safety interoperability set-aside (except for redesignating one channel for VPC use), and did not suggest that it might change the rules with respect to any channels other than Channels 84, 85, and 87. Nor did any commenter raise the possibility. We see no reason to depart from the Commission’s well-established policy of not considering matters that are first raised on reconsideration, absent extenuating circumstances.³⁸ This policy serves the same goals of procedural regularity, administrative efficiency, and fundamental fairness that underlie Section 405 of the Communications Act of 1934, as amended,³⁹ and the notice-and-comment rulemaking requirements of the Administrative Procedure Act (APA).⁴⁰

14. PacifiCorp argues that its proposed alternative channel plans are “a natural and logical outgrowth of actions already contemplated and taken by the Commission, and would merely complete the prior efforts by the Commission to ‘restore the operating capacity’ of inland VPCSA licensees.”⁴¹ We

³⁵ *Id.* at 11-13.

³⁶ *Id.* at 12. Specifically, PacifiCorp proposes that the 12.5 kHz interstitial channel between Channels 84 and 25, and the 12.5 kHz channel with the same center frequency as Channel 25, be designated for public safety interoperability in lieu of the 25-kilohertz Channel 25; and that the 12.5 kHz interstitial channel between Channels 25 and 85 be redesignated for VPC use.

³⁷ *Id.*

³⁸ See, e.g., Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, *Order on Reconsideration*, CC Docket No. 96-187, 17 FCC Rcd 17040, 17049 ¶ 19 (2002); Assessment and Collection of Regulatory Fees for Fiscal Year 2001, *Memorandum Opinion and Order*, MD Docket No. 01-76, 17 FCC Rcd 24920, 24922 ¶ 5 (2002); see also 47 C.F.R. § 1.429(b) (a petition for reconsideration in a rulemaking proceeding which relies on facts which have not previously been presented to the Commission will be granted only if the information could not have been presented to the Commission at an earlier stage or the Commission determines that consideration of the information is required in the public interest).

³⁹ See 47 U.S.C. § 405(a) (providing, *inter alia*, that “[r]econsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration”).

⁴⁰ See 5 U.S.C. § 553 (mandating that federal agencies generally adopt substantive rules only after providing interested persons with notice and an opportunity to comment).

⁴¹ Reply at 2, 5, *quoting Second Report and Order*, 23 FCC Rcd at 13714 ¶ 20. PacifiCorp puts much weight on the Commission’s stated intent to “restore the operating capacity” of the inland VPCSA incumbents. See *id.* at 2, 6. It also notes that the Commission earlier indicated that it sought “to avoid a negative impact on inland VPCSA licensees.” *Id.* at 6, *citing Further Notice*, 21 FCC Rcd at 8934-35 ¶ 60. As a preliminary matter, we note that the reference to “restor[ing] the operating capacity” of inland VPCSA incumbents appeared only in the *Second Report* (continued....)

disagree. In determining whether an agency's adopted rule can be deemed a "logical outgrowth" of a proposed rule, the focus of the inquiry is on whether the purposes underlying the APA notice-and-comment requirements have been served.⁴² In furtherance of this inquiry, the agency should consider "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule,"⁴³ and whether the final rule could have been anticipated by persons with knowledge of the proposed rule.⁴⁴

15. We conclude that interested parties who potentially may have objected to, or wished to comment on, the rule changes now proposed by PacifiCorp did not have meaningful notice that such rule changes might be adopted, and could not have anticipated that, in this proceeding focused on domestic implementation of AIS, the Commission might broadly revise the VPC channel plan. The primary objective of the rulemaking proceeding is to ensure that the United States can take full advantage of the navigational safety and homeland security benefits of AIS, but PacifiCorp's proposals address matters regarding the VPC frequency band that are at best ancillary to this objective. Nothing in the *Further Notice* suggested that the Commission might consider such action.⁴⁵ We conclude that it would not be reasonable to construe the *Further Notice* as providing notice that the Commission might adopt special measures, which had not yet been identified, if necessary to ensure that inland VPCSA licensees could fully duplicate their prior operations, and that PacifiCorp's proposed alternative channel plans are too remote from anything discussed or suggested in either the *Further Notice* or the comments to be deemed a "logical outgrowth."⁴⁶ We therefore deny PacifiCorp's petition insofar as it asks the Commission to adopt

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and Order, and thus could not have provided commenters notice. In any event, interested parties could not have anticipated major revisions to the VPC channel plan from these Commission statements about redesignating public safety interoperability channels, particularly since the Commission (and the commenters, including PacifiCorp) discussed only the existing VPC channels in this context.

⁴² See *National Mining Association v. Mine Safety and Health Administration*, 116 F.3d 520, 531 (D.C. Cir. 1997); *American Water Works Association v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (*American Water Works*).

⁴³ See *American Water Works*, 40 F.3d at 1274.

⁴⁴ See, e.g., *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 249 (3rd Cir. 2010) (*Council Tree*) ("if the substance of an agency's final rule strays too far from the description contained in the initial notice, the agency may have deprived interested persons of their statutory right to an opportunity to participate in the rulemaking"), citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be 'a logical outgrowth' of the rule proposed. The object, in short, is one of fair notice.").

⁴⁵ This serves to distinguish the instant matter from the two cases cited by PacifiCorp in support of its "logical outgrowth" argument. See PacifiCorp Reply at 5 n.5. In the first case, the changes to the proposed rule that were adopted in the final rule were discussed in the comments; indeed, the litigant challenging the adequacy of the agency's notice had itself filed comments specifically discussing those changes, undermining its own argument. See *Public Service Commission v. FCC*, 906 F.2d 713, 718 (D.C. Cir. 1990) (*PSC v. FCC*). In the second case, the substance of the final rule also was discussed in comments and proposals that were in the record prior to the adoption of that rule. See Amendment of Section 22.501(a) of the Rules to Allow the 35 and 43 MHz Frequency Bands to be Used for One-Way Paging on an Exclusive Basis in the Public Land Mobile Service, *Order on Reconsideration*, CC Docket No. 80-189, 60 Rad. Reg. 2d (P&F) 226, 228 ¶¶ 6-7, 1986 WL 292512 (1986) (*35/43 MHz Reconsideration Order*). Also, in each cited case, the challenged rule amendment furthered the primary objective of the rulemaking proceeding. See *PSC v. FCC*, 906 F. 2d at 718; *35/43 MHz Reconsideration Order*, 60 Rad. Reg. 2d (P&F) at 228 ¶ 6.

⁴⁶ See, e.g., *Council Tree*, 619 F.3d at 255-256.

one of PacifiCorp's alternative VPC channel plans.⁴⁷

C. Rule Corrections

16. Having determined to affirm our decisions regarding the grandfathering provisions adopted in the *Second Report and Order*, we take this opportunity to amend Section 80.371(c)(1)(i) of the Rules⁴⁸ to more precisely conform it to those decisions. As noted above, the Commission grandfathered two site-based licensees operating on Channel 87B in inland VPCSA's for fifteen years.⁴⁹ Site-based Channel 87B licensees in the *maritime* VPCSA's are grandfathered only until their current license terms expire.⁵⁰ But note three to Section 80.371(c)(1)(i) was not amended to reflect the Commission's decision in the *Second Report and Order* to provide a different grandfathering period for the site-based licensees operating on Channel 87B in the *inland* VPCSA's, and thus incorrectly provides, without qualification, that no site-based authorization to use Channel 87B will be renewed.⁵¹ As we have explained, while accurate prior to the adoption of the *Second Report and Order*, that statement is now accurate only with regard to the Channel 87B site-based incumbents in the maritime VPCSA's. We therefore amend note three to reflect that Channel 87B site-based incumbents in inland VPCSA's have been grandfathered for fifteen years, irrespective of their remaining license term.⁵²

IV. CONCLUSION

17. PacifiCorp fails to establish that the Commission should have provided inland VPCSA incumbents with a longer grandfathering period. Permitting inland VPCSA incumbents to remain on

⁴⁷ We agree with Motorola that PacifiCorp's proposals would more appropriately be raised in a petition for rulemaking to ensure that all of the ramifications of its proposals can be carefully considered. See Opposition at 1, 3. A number of critical questions surrounding PacifiCorp's proposals are not addressed in the Petition. Most conspicuously, PacifiCorp discusses its channel-splitting plan only in terms of the spectrum efficiency benefits that it may bring to private land mobile radio users of VPC spectrum, such as itself and the public safety incumbents, but does not explain how adoption of those proposals might affect maritime users of the spectrum. Even with respect to PacifiCorp's alternate proposal to retain the existing VPC band plan but shift the public safety interoperability spectrum, the Commission would need to devise rules to address complexities regarding a mandatory relocation that public safety users could not have anticipated from the *Further Notice*. Our decision herein is without prejudice to PacifiCorp making these same proposals in a petition for rulemaking.

⁴⁸ 47 C.F.R. § 80.371(c)(1)(i).

⁴⁹ See *Second Report and Order*, 24 FCC Rcd at 13722-23 ¶ 17.

⁵⁰ See *Report and Order*, 21 FCC Rcd at 8933 ¶ 57; 47 C.F.R. § 2.106 n.US228 (providing, *inter alia*, that "in VHF Public Coast Service Areas (VPCSA's) 1-9 [*i.e.*, the maritime VPCSA's], site-based stations ... may continue to operate on a co-primary basis on [Channel 87B] until expiration of the license term," but that "in VPCSA's 10-42 [*i.e.*, the inland VPCSA's], site-based stations licensed [on Channel 87B] ... may remain authorized to operate on a co-primary basis in that frequency band until March 4, 2024"). We also take this opportunity to correct a typographical error in note US228 and Section 90.20(g)(2)(ii), which state that incumbent site-based Channel 87B licensees in the inland VPCSA's are grandfathered until March 4, 2024, rather than March 2, 2024 (fifteen years after the effective date of the rule amendments adopted in the *Second Report and Order*). See 74 Fed. Reg. 5117 (Jan. 29, 2009)). (Note US228 was codified as note US399 in the *Second Report and Order*, 23 FCC Rcd at 13736 Appendix B, but was later renumbered. See Amendment of Parts 1, 2, 15, 25, 73, and 90 of the Commission's Rules to Make Non-Substantive Editorial Revisions to the Table of Frequency Allocations and to Various Other Rules, *Order*, 25 FCC Rcd 9712, 9720 ¶ 16 Table 2 (OET/OMD 2010).)

⁵¹ See 47 C.F.R. § 80.371(c)(1)(i) n.3.

⁵² Because these amendments merely conform the wording of the rules to an express decision that was adopted in the *Second Report and Order*, we find good cause to adopt the amendments without undertaking additional notice and comment. See 5 U.S.C. § 553(b)(3)(B).

Channel 87B until after Channel 84 and 85 are cleared of public safety incumbents would delay and impede the effective and efficient implementation of AIS in the United States, and thus undermine the primary objective of this rulemaking proceeding. In addition, given that Channels 84 and 85 are not heavily encumbered by public safety incumbents throughout the country, it appears that any difficulties that inland VPCSA incumbents may experience as a consequence of being required to relocate to Channel 84 or 85 before the local public safety incumbents have to vacate those channels are limited to just a few geographic areas, and thus are better addressed through the waiver process rather than by further rule amendment. Finally, the proposed alternative VPC channel plans were not discussed prior to the release of the *Second Report and Order*, and are not a logical outgrowth of the proposals in this rulemaking proceeding, so cannot be considered at this stage of the proceeding. We accordingly deny the petition, and affirm the *Second Report and Order*.

V. PROCEDURAL MATTERS

A. Paperwork Reduction Act

18. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

B. Further Information

19. For further information, contact Jeff Tobias, Mobility Division, Wireless Telecommunications Bureau, (202) 418-1617, or TTY (202) 418-7233, or via electronic mail at Jeff.Tobias@fcc.gov.

20. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty). This *Memorandum Opinion and Order* can also be downloaded at: <http://www.fcc.gov/>.

VI. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, that the petition for reconsideration filed by PacifiCorp on March 2, 2009, IS DENIED.

22. IT IS FURTHER ORDERED, pursuant to the authority of Sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, that Parts 2 and 80 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix A, effective thirty days after publication in the Federal Register.

23. IT IS FURTHER ORDERED that the proceeding WT Docket No. 04-344 IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 C.F.R. parts 2, 80 and 90:

**I. PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS;
GENERAL RULES AND REGULATIONS**

1. The authority citation for part 2 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

2. Section 2.106 is amended by revising footnote US228 to read as follows:

§ 2.106 Table of Frequency Allocations.

UNITED STATES (US) NOTES

* * * * *

US228 The use of the bands 161.9625–161.9875 MHz (AIS 1 with center frequency 161.975 MHz) and 162.0125–162.0375 MHz (AIS 2 with center frequency 162.025 MHz) by the maritime mobile service is restricted to Automatic Identification Systems (AIS), except that non-Federal stations in the band 161.9625–161.9875 MHz may continue to operate on a primary basis according to the following schedule: (a) In VHF Public Coast Service Areas (VPCSAs) 1–9, site-based stations licensed prior to November 13, 2006 may continue to operate until expiration of the license term for licenses in active status as of November 13, 2006; (b) In VPCSAs 10–42, site-based stations licensed prior to March 2, 2009 may continue to operate until March 2, 2024; and (c) In VPCSAs 10–42, geographical stations licensed prior to March 2, 2009 may continue to operate until March 2, 2011. *See* 47 CFR 80.371(c)(1)(ii) for the definitions of VPCSAs and geographic license.

* * * * *

II. PART 80 -- STATIONS IN THE MARITIME SERVICES

3. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 307(e), 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 307(e), 309, and 332, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

4. Section 80.371 is amended by revising footnote 3 to the table in paragraph (c)(1)(i) to read as follows:

§ 80.371 Public correspondence frequencies.

* * * * *

(c) Working frequencies in the marine VHF 156-162 MHz band. (1)(i) * * *

³ The frequency 161.975 MHz is available only for Automatic Identification System communications. No license authorizing a site-based VHF Public Coast Station or a Private Land Mobile Radio Station to operate on the frequency 161.975 MHz in VHF Public Coast Service Areas (VPCSAs) 1-9 will be renewed unless the license is or

has been modified to remove frequency 161.975 MHz as an authorized frequency. In VPCSA 10-42, site-based stations licensed to operate on frequency 161.975 MHz prior to March 2, 2009 may continue to operate on a co-primary basis on that frequency until March 2, 2024. Licenses authorizing geographic stations to operate on frequency 161.975 MHz will be modified on March 2, 2011 to replace the frequency with either frequency pair 157.225/161.825 MHz (VPCSA 10-15, 23-30, 33-34, 36-39, and 41-42) or frequency pair 157.275/161.875 MHz (VPCSA 16-22, 31-32, 35, and 40), unless an application to so modify the license is granted before that date.

* * * * *

III. PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

5. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Secs. 4(i), 11, 303(g), 303(r) and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

6. Section 90.20 is amended by revising paragraph (g)(2)(ii) to read as follows:

* * * * *

(g) * * *

(2) * * *

(ii) The channel pairs 157.225 MHz/161.825 MHz and 157.275 MHz/161.875 MHz were formerly allocated and assigned under this section as public safety interoperability channels but were reallocated for assignment as VHF public coast station channels under § 80.371(c) of this chapter. Public safety operations licensed on these channels as of March 2, 2009 or licensed pursuant to an application filed prior to September 19, 2008, may remain authorized to operate on the channels on a primary basis until March 2, 2024.

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